



## NSW Children's Guardian

### Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse

#### Issues Paper 1 – Working with Children Check

The NSW Children's Guardian welcomes the opportunity to comment on the questions raised in Issues Paper 1 about whether the Working with Children Check (WWCC) should be nationally and consistently applied. The Children's Guardian has also provided information and comments to the Department of Premier and Cabinet in relation to the NSW Government's submission. This submission supports and reiterates the comments made in the NSW Government submission and makes some additional observations.

The WWCC is an internationally recognised safeguard for protecting children and young people, although it must not be regarded as the ultimate safeguard. Rather, it is a tool of risk management and should be used to complement well monitored and audited child safe policies and practices to ensure safe environments for children.

New South Wales was the first state in Australia to establish a WWCC in 2000 under the *Commission for Children and Young People Act 1998*. Since then, other Australian jurisdictions have introduced WWCCs. While following the settings in the NSW model to define child related employment and the records that bar a person, other jurisdictions have also improved on it to provide workers a portable and renewable clearance that can be used over a fixed period for any child related work.

In June 2013, NSW introduced a new and improved model for the WWCC under the *Child Protection (Working with Children) Act 2012* and *Child Protection (Working with Children) Regulation 2013*. The new model was based on the recommendations of the 2010 statutory review of the *Commission for Children and Young People Act 1998* and the 2010 Auditor General's performance audit of the WWCC. This new model is an improvement on the previous model in five key ways:

- It provides the same WWCC for paid workers, volunteers, self employed people, authorised carers and adults sharing their homes.
- It has only two outcomes: a clearance or a bar, so employers can no longer engage a person assessed as high risk.
- The clearance is portable and renewable and ordinarily lasts for five years (unless cancelled during the term of the clearance).
- It accesses full criminal histories instead of a defined sub set of records and continuously monitors new NSW records to manage risks of clearance holders.

- It is easier to operate with streamlined online systems and centralised operations.

Simultaneously, in June 2013, the operation of the new WWCC and functions relating to developing and promoting child safe practices in children's organisations were transferred from the Commission for Children and Young People to the Children's Guardian. This transfer of functions better aligns the WWCC with the other functions of the Children's Guardian which include accrediting agencies that arrange the provision of statutory out of home care, accrediting NGO adoptions service providers, regulating agencies that provide, arrange and supervise voluntary out of home care and regulating the employment of children under the age of 15 (and child models under the age of 16) in prescribed industries.

Being responsible for the operation of the new WWCC and as the regulator of a number of other varied operations in the area of child protection, the Children's Guardian is of the view that the new NSW WWCC scheme provides a model for a national scheme. However, the Children's Guardian reiterates that its effectiveness in protecting children lies only as a tool in the wider context of the implementation of effective child safe organisation policies and practices and not as an end in itself.

### ***1. Should there be a national WWCC?***

By way of background, there is some limited regulation in relation to WWCCs across Australia. Six Australian states and territories operate a statutory WWCC. However, each of the statutory systems is different and there is very limited mutual recognition of interstate WWCCs.

In 2006 all checking jurisdictions signed a national agreement called the Exchange of Criminal History Information for People Working with Children (ECHIPWC). Other jurisdictions have since signed the agreement at commencement of their local WWCCs. The agreement releases all jurisdictions from the impact of their spent conviction legislation with regard to national criminal histories in the WWCC. Jurisdictions now access the same criminal history information about the same individuals seeking a WWCC. The key exception is that Victoria does not exchange non-conviction charges or information relating to Victorian non-conviction charges under the Exchange. While this information sharing agreement has produced a higher level of consistency in the affected decisions, it is still far from delivering a national WWCC.

Against the current background, there are a number of persuasive arguments for a nationally consistent WWCC:

- Without a national WWCC, organisations and individuals who work across state and territory borders need to understand and apply multiple versions of the WWCC. This involves significant resource investment for both individuals and businesses.
- The rules applied by the six WWCC schemes are different. A person barred from working with children in one state might, for example, be cleared to work with

children in another, and vice versa. The actual risk posed by the individual is the same, only the statutory rules are different.

- Jurisdictions' WWCC programs cannot routinely access interstate court transcripts or records from the public prosecutors, as there is currently no centralised source of such records comparable to the national police records accessible through CrimTrac. Court transcripts and public prosecutor briefs are critically important in understanding the actual risk that an individual presents.

However, delivering such a nationally consistent model is not without its difficulties primarily because of the differences in the relevant criminal laws of each state and territory. There are a number of models that could achieve a national WWCC.

### **Model 1: Centralised federal system**

A centralised federal system would deliver a uniform approach to the WWCC. The challenges of this option are to achieve state and territory agreement to a uniform standard and revoke existing preferred approaches. Each jurisdiction's WWCC reflects its unique cultural and political environments which may be difficult to achieve via a centralised system. There could also be concern about transferring what is essentially a state responsibility to the federal government.

### **Model 2: Uniform national laws and minimum operating standards, with jurisdictions responsible for WWCC operations**

This model is based on a national law that is adopted into state and territory legislation and implemented by states and territories on agreed minimum operating standards. It will allow for a range of implementation approaches that deliver consistent and predictable outcomes lending itself to delivering a nationally consistent WWCC. This approach is being increasingly adopted in other areas such as education, child care, licensing and out of home care sectors.

Jurisdictions would implement the nationally agreed minimum standards and operate the system. A WWCC clearance issued by one jurisdiction would have currency around Australia. The jurisdictions would share information about applications and their outcomes through a centralised database that employers around the country could use to verify the WWCC status of their child-related workers.

This approach takes advantage of existing infrastructure and expertise while delivering a national program. Jurisdictions would not be duplicating each others' work or delivering different WWCC outcomes, as they would not be assessing any applications already considered in another jurisdiction.

The National Operators Forum (NOF) for the WWCC has undertaken a number of case studies at workshops over several years. These workshops have shown that overall, there is a very consistent approach to decision-making and that there is interstate consistency in assessment of risk. Where the laws do not prevent it, it would appear that risk assessors in all states will arrive at consistent decisions about risk levels presented by individuals. This consistency provides a level of certainty that state and

territory implementation of uniform national standards will result in generally consistent outcomes. Establishing nationally agreed minimum standards may also protect against jurisdictional forum shopping.

### **Model 3: Jurisdictions develop mutual recognition laws and protocols that recognise clearances and bars issued in other jurisdictions.**

This model leaves the states and territories to operate their existing WWCCs, simply developing additional rules that allow recognition of clearances and bars from interstate WWCCs.

While this model will cause minimum disruption to existing practice, interstate WWCCs will continue to deliver different outcomes for the same person, given the different rules and settings in the separate models and the limitations on current access to interstate court and prosecution records. This could also result in forum shopping which will undermine the rationale for a nationally consistent approach.

## **2. What features should be included in any national scheme?**

A national scheme needs to provide universal standards for:

- Who needs a WWCC (*in NSW, all child-related volunteers, paid workers, self employed people, all persons in statutorily specified child related roles, authorised carers, adult household members, prospective adoptive parents, workers who are not otherwise in child related employment but who have been approved by the Children's Guardian because of access to confidential information (unless exemptions apply)*)
- Who applies for the check (*in NSW, individuals apply for their own check*)
- Methods and manner of identity verification for applicants (*in NSW, this is undertaken by the RMS using their identity verification system*)
- Barring information (*In NSW, a person may be automatically barred if they have been convicted or charged with specific offences or they may be risk assessed and subsequently barred by decision of the Guardian on the basis of expanded information including spent convictions, pending charges, non-conviction charges (including acquittals and withdrawn charges)*)
- Assessment trigger records (*in NSW, these trigger records are listed in Schedule 1 of the Act and include specific offences, pattern triggers and misconduct reports. However, the risk assessment triggers do not limit the circumstances when a risk assessment can be done*)
- Barring records (*in NSW, these records are listed in Sch 2 of the Act*)
- What is the outcome of a check (*in NSW, a bar or clearance*)

- What type of system (*in NSW, a streamlined online application, registration and verification system is adopted and applicants are initially issued an application number followed by a clearance number if cleared*)
- Who pays and how much (*in NSW, paid workers pay \$80, volunteers and nominated others are free*)
- Term of a WWCC (*in NSW, 5 years, portable and renewable (unless the clearance is cancelled earlier)*)
- Avoiding post clearance risk (*in NSW, cleared applicants are subject to continuous monitoring of any new NSW criminal records and misconduct reports*)
- Exemptions from the requirement to hold a WWCC (*in NSW, the exemptions are listed in the Regulation and cover a range of situations*)
- Uniform definitions of children, child-related work and other key terms (*in NSW, children are defined as under 18; child related work is identified by settings that are elaborated in the Regulation*)
- What must be considered in a risk assessment (*in NSW, the matters to be considered are listed in the Act but also provides for extension beyond the listed matters*)
- Application of interim bars (*in NSW, interim bars can be issued to prevent a person from working with children while their application is being completed if upon an initial risk assessment an applicant is considered to present high risk to children*)
- Employer obligations (*in NSW, employers are required to verify online a worker's WWCC status, i.e. whether the person has made an application, cleared or barred and penalties apply for failing to do so*)
- Appeals against a bar (*in NSW, there are broad appeal rights whereby any barred person (except those convicted of child murder or have a pending charge for a barring offence) can appeal*)
- Employer protections (*in NSW, employers are offered protection for dismissing or suspending workers who are required to hold a valid WWCC, but do not hold one*)
- Access to relevant information (*in NSW, WWCC operators have access to relevant information, including criminal history records, court and public prosecutor records, employer disciplinary records and licensing authority records*)

- Efficiency of the system (in NSW, over 70% of checks are cleared within 24 hours)

It is also desirable that a national scheme set “child safe” standards for children’s organisations. The WWCC is effective in excluding known serious offenders from child-related work. But it is not able to protect children where there is no formal record of a person’s abuse of children or where a person has yet to start abusing children. For this reason, children’s organisations should not rely solely on the WWCC to keep children safe. Several WWCC schemes already in existence are complemented by “child safe” standards. In Queensland there is a statutory obligation to adhere to these standards. The Children’s Guardian supports the inclusion of such a regime in a national law.

Key child safe standards for a national WWCC would include:

- Safe recruitment, including the WWCC where required, and active verification of previous work history.
- Codes of conduct that set out for workers, children and parents what conduct is acceptable and what conduct is not acceptable.
- Processes to respond effectively to complaints, comments and allegations relating to the safety and welfare of children in the organisation.
- Processes to identify risks to children in the organisation and to manage those risks.
- Processes that provide for children to feel confident that their concerns will be listened to and taken seriously.

### ***3. If there is no national scheme, should there be minimum requirements for each state and territory scheme?***

The various state and territory schemes could already be said to meet key minimum standards, as all the schemes share a number of key factors. The real difficulty in maintaining separate state and territory schemes is the ways they exceed minimum standards, for example, by way of the varied exemptions that are available in different jurisdictions.

The Children’s Guardian is of the view that the features listed at paragraph 2 above constitute the matters that must be addressed in any attempt at identifying minimum standards.

### ***4. How long should any clearance be granted for?***

In NSW, the clearance is portable and applies for all child related positions, rather than being attached to individual jobs, for a period of 5 years. To ensure that persons who are cleared to work with children continue to be safe while they hold accreditation, the continuous checking mechanism allows for employers to be informed and clearances cancelled if subsequent relevant NSW criminal records or misconduct matters arise.

However, the continuous checking mechanism does not currently have access to information about national criminal records. This would be an important factor in any national scheme.

The various WWCC schemes currently provide clearances that last for periods of between three and five years. The need to re-check applicants relates to the fact that there is not currently a system in place that can alert WWCC operators to new national charges laid against a person with a WWCC clearance. Only local jurisdictional new charges are currently the subject of such alerts. A new check is needed at regular intervals to ensure that new national records are available for assessment.

Even if a national system of alerts for new serious records were in place, applicants would need to renew their applications every five years, simply so that the expense and intrusion of monitoring for new records was targeted appropriately to people continuing to work with children. Once a national database provided routine alerts of new relevant charges and convictions, it may be possible to provide renewals at a lower cost to applicants.

The Children's Guardian supports a five yearly renewal, provided there is continuous updating of criminal records consistent with the NSW approach (but extending to national criminal records).

### ***5. Should a person be able to commence work before the check is completed?***

The new WWCC model allows a person to apply for a WWCC clearance before they enter into active employment or at the same time as entering into active employment. As long as an application has been made, a person is allowed to commence work with children (i.e. while the application is being processed and before the check is completed and a clearance is granted).

To protect against risks to children while a person's application is being processed, the new NSW WWCC, like many interstate versions, provides that a person whose records indicate a serious risk can be issued with an interim bar while the risk assessment is finalised. This provides an important protection for children during the several months it can take to obtain the police, court and other information required to properly assess risk. Most of the time, this detailed information shows that the applicant no longer presents, or never really did present, a serious risk to children.

Until the new WWCC started in NSW allowing people who have a current application on foot to work with children, people could not commence work until they had a WWCC clearance. As a result, many people were kept out of work while relevant records were tracked down (and found to not indicate risk) and cases of mistaken identity were sorted out. Given that few people will eventually be barred, and those with concerning records can be barred pending completion of their assessment by way of an interim bar, it is unnecessary to deny people employment while their WWCCs are being processed.

In emergency situations, a person should be allowed to commence child related work without making an application but must not continue for more than a very short period (5 days in NSW) without applying for a WWCC. This short grace period allows for emergency appointments (for example, late night placements with authorised carers).

## **6. How should child-related work be defined?**

In NSW, section 6 of the *Child Protection (Working with Children) Act 2012* defines child-related work as that which involves direct contact with children, i.e. physical or face to face contact, and which occurs in specified sectors or roles. In addition, a non child related role may be considered child related and therefore requiring a WWCC if it is approved by the Children's Guardian on application by the employer because of the worker's access to confidential records or information about children.

The WWCC is intended to protect children in situations where a person can develop a relationship of trust with a child and abuse that relationship. Child-related work should be defined to include the types of professional and work-related contact that allows the development of such a relationship between an adult worker and a child.

The professional engagements that allow such relationships to develop should cover:

- paid work, whether as an employee, contractor or self-employed person
- unpaid work (volunteering and unpaid internships)
- unpaid work as a student on a placement required to achieve a formal qualification (excluding secondary school work experience placements)
- work as a minister of religion or spiritual leader of a religious body.

The definition of child related work must be read together with the exemptions set out in the Regulation and described in relation to question 8 below to fully appreciate its ambit of operation.

## **7. How should child-related sectors and roles be defined?**

WWCC should target those sectors and roles that would attract people seeking to establish and abuse a relationship of trust with a child. Sectors and roles where contact with children is incidental and limited should be excluded.

In NSW, the new model of the WWCC lists both sectors and roles. In the listed sectors, only those workers whose work requires direct physical or face to face contact with children require a WWCC. Work within a defined sector that does not involve this contact does not require a WWCC. All work in a child-related role is subject to the WWCC.

The child-related sectors in NSW are detailed in the Regulation as follows:

- child development and family welfare services
- child protection

- children’s health services
- clubs or other bodies providing services for children
- disability services
- early education and child care
- education
- entertainment for children
- justice centres
- religious services
- residential services
- transport services for children
- youth workers.

The child related roles that have been specified in the Act in NSW are:

- an approved provider or manager of an education and care service
- a certified supervisor of an education and care service
- an authorised carer
- an assessment officer within the meaning of s 27A of the *Children and Young Persons (Care and Protection) Act 1998*
- the principal officer of a designated agency
- the principal officer of an accredited adoption service provider within the meaning of the *Adoption Act 2000*.

The NSW requirement for the authorised head of adoption agencies, out of home care agencies and child care services to have a WWCC, unless an exemption applies is not replicated in all jurisdictions.

In addition to the above, adult household members of authorised carers and providers of education and care services are required to have a WWCC. Prospective adoptive parents have also been brought within the purview of the new model.

**8. *Are current exemptions for a WWCC adequate or appropriate – in particular, should a WWCC apply to those:***

***a. living in the homes of children in out-of-home care?***

***b. parent volunteers?***

There are very similar exemptions applied across interstate WWCC programs. All provide some level of exemption for young people, parent volunteers and people whose work involves only limited and short-term contact with children. Exemptions are provided for several reasons.

*To minimise duplication*

Exemptions can be used to minimise duplication where workers are separately checked through an alternative probity-checking regime. Such exemptions in NSW include home care workers holding a current police certificate for aged care, for home care work where the clients are not primarily children.

#### *Where there is a low level of risk*

Exemptions can also be used where risk is low. Such exemptions in NSW include:

- school ancillary work involving minimal contact with children
- work that is child related for fewer than five days a year
- workers who are under 18
- private health practitioners who do not see children without other adults present
- one-off visits by speakers, adjudicators, performers, assessors etc who are not left alone with children.

#### *Where there is urgency*

- a person can work for 5 days without a WWCC in emergency situations where children need to be cared for immediately.

#### *To reduce red tape*

- interstate workers with a home state WWCC - for up to 30 days per year
- interstate health practitioners working in NSW for up to 5 days in a 3 month period
- interstate workers at special events like jamborees, tours etc for up to 30 days.

#### *Where children are already within family / domestic relationships*

- private family arrangements where friends and neighbours provide care for children
- volunteering with your children's activities and schools
- paid work where the children involved are your relatives – for example, tutoring a younger sibling.

#### *Where it is not appropriate*

- co-workers or work supervisors of a child: these are people who have not sought to work with children and whose sectors may or may not be child-related.

### **Exemptions for people living in the homes of out of home carers**

The Children's Guardian strongly supports the use of the WWCC for adult people living in homes where out of home care is provided and is of the view that exemptions should not be granted to this group.

Most sexual abuse takes place in the child's home. A child requiring out of home care is particularly vulnerable. Not only is the child in an unfamiliar environment, but also the new environment is proposed as a refuge from harm. It is unacceptable for these vulnerable children to be placed in homes with high-risk offenders.

In NSW, the requirement for adults residing with authorised carers or children's service providers for over 3 months to have a WWCC was first introduced by the *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009* in response to the recommendations in the *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (the Wood Report). This requirement became operational in November 2009.

Under the new provisions in NSW, adults persons residing with authorised carers and providers of home based education and care services or family day care services for more than 3 weeks are required to apply for a WWCC and the clearance process will be the same as for all other applicants. The designated agency that authorises the authorised carer or the approved provider of home based education and care services or family day care services must ensure compliance and would be liable for a penalty for failure to ensure such compliance.

Given that authorised carers and their adult household members are a high risk group because of their contact with vulnerable children, the Children's Guardian in its submission to the Commission for Children and Young People regarding the draft Child Protection (Working with Children) Regulation specifically requested that existing authorised carers and their adult household members be transitioned in the first phase in period in 2013 with other high risk groups, rather than in 2015, as was proposed. After extensive discussions about the proposed phase in dates, this group was included in the first phase in period on the commencement of the new Act, i.e. 15 June to 31 December 2013.

### **Exemptions for parent volunteers**

The exemption for parent volunteers has been in place from the commencement of the WWCC in most jurisdictions. The rationale for this exemption is based on the view that participating in a child's activities, including schooling, sports and other programs is intrinsic to being a parent and must be encouraged. However, this must be balanced against possible risks to children and young people.

Currently, under the new WWCC model, parents or close relatives of a child are exempted from the requirement for a WWCC if they are volunteering at the child's school or if they are volunteering in connection with a team, program or other activity if the child is a member or usually participated in that team or activity. This exemption does not however, apply if the volunteering involves providing personal care services to children with disabilities that involves intimate contact with those children or if it involves mentoring services. In those circumstances, the exemption will not apply, i.e. those parents or close relatives are required to have a WWCC.

The way any possible risk was managed in NSW until the commencement of the new WWCC model was by requiring parent volunteers to sign a declaration that they had no barring convictions. These declarations are no longer part of the statutory program. However, to address concerns about the exemptions granted to parent/close relative

volunteers and other exempt workers, the new WWCC model has introduced a system for auditing an 'opt in' statutory declaration scheme by virtue of a recent amendment to the *Child Protection (Working with Children) Act (s 40A)*. The implication of this scheme is that the Children's Guardian or a person authorised by the Guardian will be empowered to audit and verify the accuracy of a statutory declaration provided to an employer by obtaining information from the Commissioner of Police, about a person's convictions. The statutory declaration will state that they have not been convicted of an offence under Schedule 2. Any such 'opt in' scheme must however form part of a child safe strategy.

The Children's Guardian is currently consulting with stakeholders as to whether the higher risk parent volunteer activities should be distinguished from other parent volunteering. In particular, consideration is being given to whether the exemption should be revoked for volunteering in school camps and other overnight excursions. The practical issues in relation to ensuring compliance and limiting the check to high risk parent volunteers is currently being discussed by an inter-departmental group and other key stakeholders with a view to progressing a possible amendment to the Regulation later this year.

### ***9. What records should be included in the check? For example, should the check include juvenile records?***

The WWCC should receive a full and unabridged national criminal history, including:

- charges
- convictions
- spent convictions
- juvenile records (charges and convictions).

In NSW, as in other jurisdictions, there are two levels of assessment. Certain convictions and pending charges lead to an automatic bar that can only be overturned by a court (the Administrative Decisions Tribunal).

The records that should lead to an automatic bar should include adult records of:

- convictions for serious sexual offences (sexual assaults, indecent assaults, child pornography, child prostitution etc)
- pending charges for these same matters
- convictions for child murder.

In NSW some serious violence offences also lead to an automatic bar.

The records that should lead to an assessment of risk should include:

- juvenile records for automatic barring matters
- non-conviction charges for other serious sexual assaults
- charges and convictions for manslaughter of a child (except in driving accidents)

- charges and convictions for serious physical assaults on children
- convictions for arson, child neglect and cruelty to animals and drug offences involving children (other than sale of drugs).

Some jurisdictions provide an automatic bar only for child sexual assaults. While NSW would prefer a broader range of matters to lead to an automatic bar, there is no question that these child sexual assault matters are the most significant matters for the WWCC.

In NSW, no conduct of a juvenile offender can lead to an automatic bar. This offers a realistic acknowledgement of the youth and immaturity of a juvenile offender, without exposing children to real risks. Not all juvenile offenders are benign or simply immature. Some are involved in extremely serious conduct that is deeply concerning. To protect children properly, juvenile records must be available for assessment. Risk assessment rules will provide for fair and reasonable outcomes where immaturity is a significant factor in the conduct. It is important that a national WWCC provide, as NSW does, that juvenile records cannot be used to impose an automatic bar, but can be considered in risk assessment.

In NSW, findings of misconduct involving children are also available for risk assessment. The NSW WWCC is supported in this regard by the NSW Ombudsman, who has a statutory role in ensuring that regulated children's organisations (schools, child care centres, out of home care and government services for children) report and properly investigate allegations of sexual, physical and psychological harm to, and neglect of children.

Findings by reporting bodies (who comprise specified employers) that sexual misconduct or serious physical assault occurred are reported to the WWCC operator for risk assessment. The NSW experience is that some very serious sexual offending takes place in workplaces. These matters are not always reported to police, or if reported, do not always result in timely charges. While there are arguments to suggest it would be better for them to be managed through the criminal justice system, we cannot ignore the fact that this does not always occur.

If WWCC operators do not collect this information, many high-risk people will be able to continue working with children. Accordingly the Children's Guardian strongly supports a national law that includes obligations for employers in children's organisations to report findings of sexual misconduct and serious physical assault against children by their workers, and for these findings to be considered in risk assessments for the WWCC.

In making an assessment of whether a person should be granted a WWCC, another matter that the Children's Guardian can take into account is a notification of concern made by the Ombudsman. A notification of concern arises from information received by the Ombudsman in the course of exercising the Ombudsman's functions, which in the Ombudsman's view may satisfy the Children's Guardian that the person poses a risk

to the safety of children. The purpose of including such notifications for risk assessment purposes is to ensure that any serious matters that pose a risk to the safety of children that do not otherwise fall within an assessment trigger are brought to the attention of the Children's Guardian.

The probative value of Apprehended Violence Orders (AVOs) is a matter that has been the subject of considerable debate and warrants further consideration. Under the previous WWCC system in NSW, "relevant AVOs", being orders made for the protection of a child (or a child and others) were taken into consideration in risk assessment for a WWCC and the Commission for Children and Young People maintained a database of AVOs for this purpose.

However, concerns about its use were raised in both the 2010 Auditor General's Review and the independent review of the *Commission for Children and Young People Act 1998*. The independent review found that AVOs were not adequately targeted and were not generally a reliable guide to assessing risk to children. It proposed that AVOs initiated by Joint Investigative Response Teams (JIRTs) that focus on child protection investigations, would provide the level of targeting and evidence needed for a record that triggers an assessment. However, at present JIRT initiated AVOs are not recorded in a way that allows reliable and accurate identification of these records.

Relying on a subset of AVOs where there has been a final AVO protecting a child in conjunction with an investigation into physical and sexual abuse committed against the child, or a 'risk of significant harm' report may be an option worth considering, However, not all investigations of child abuse or applications for AVOs are managed by the NSW Police force arm of JIRT and further options need to be explored with NSW Police.

Given that the probative value of AVOs (whether as a subset or otherwise) is unresolved, the use of AVOs in the new WWCC system has been delayed until its efficacy has been appropriately evaluated. As such, AVOs are not specifically included as an assessment trigger in Schedule 1 of the *Child Protection (Working with Children) Act 2012*.

The Act does however, make provision for extending the circumstances when a risk assessment can be made (section 15(3) ) and provides that when making an assessment, the Guardian can consider other necessary matters (s 15(4)(k)). Thus though not specifically included, AVOs may be considered for risk assessment purposes, if such information is available and considered relevant for an assessment of risk to children.

While the use of AVOs as an assessment requirement trigger whether as a subset or otherwise, is under consideration in NSW, the Children's Guardian is of the view that, for the purposes of the national check, the role and place of AVOs in WWCC risk assessment must be given due consideration.

## ***10. How should an appeal process operate?***

An appeal process is intended to ensure transparency in decision-making and process adopted. In the past, under the previous WWCC, a number of offenders were prevented from appealing their prohibited status. While the appeal process should be accessible, certain criminal offences should not be appealable.

Under the new WWCC model, all barred persons may appeal the decision unless they have been convicted of child murder or they have a pending charge for an offence listed in Schedule 2 of the Act (i.e. automatic barring offences). An interim bar can only be appealed if it has been in place for more than six months

Appeals should be made to an authority independent of the WWCC operator. In NSW, appeals are made to the Administrative Decisions Tribunal. Appeals should result in a direction to the WWCC operator to issue a specific outcome (bar or clearance) rather than a referral back for operator decision. Where an appeal has been rejected, a person may not apply for WWCC for five years.

An administrative decisions tribunal, like that in NSW, is the appropriate authority for appeals. Further appeals on matters of law should be available to a higher court, like the Supreme Court in NSW. A national law should provide that jurisdictional court systems be used for appeals.

During a risk assessment, WWCC operators may require further information about the offence or other matter related to the application, such as the applicant's previous employment, medical conditions, training and personal development to inform a picture of current risks. If an applicant does not provide this information within a set period (six months in NSW), the Children's Guardian may terminate the application. This would mean that there would no longer be a valid application on foot, and consequently would prevent the applicant from working with children. Where an application is terminated in this manner in NSW, an appeal is not available as the applicant has not been barred.

In some jurisdictions, there is no provision for case closure without appeal. These jurisdictions may instead have provision for an internal review before a formal appeal may be launched in cases where the applicant has not provided the information requested for initial decision-making.

The national law must make provision either for case closure without appeal where the applicant does not respond to requests for information, or for some other process that limits appeal rights where the WWCC operators have not had the opportunity to make an informed decision about risk because of the applicant's failure to provide information.

## ***11. What issues arise from the current regime of records that result in automatic barring of a person from working with children?***

The benefit of the automatic bar is that it is quick and reduces risk assessment investment where a bar is not contested. In NSW a person with a conviction or a pending charge for a barring offence is automatically barred. Barring offences are set out in Schedule 2 of the Act. A person barred because of a pending charge, is clearly a challenging situation if the person is ultimately cleared of the offence. However, the child protection benefits of this policy are considered to outweigh the possible detriment to an affected individual. It would be an unacceptable risk to children if a person awaiting trial for serious sex offences could be cleared to work with children.

In NSW, the Administrative Decisions Tribunal may issue an order that stays the operation of the bar during the appeal process. This reduces the impact of a bar for these applicants, but it still involves a degree of immediate disruption. NSW law does not allow a stay to be sought before a bar is issued.

Where an automatic bar has been imposed (i.e. because of a disqualifying offence under Schedule 2 of the Act), there is no requirement to issue a notice of intention to bar. However, even with automatic bars, the WWCC operator must contact the applicant and confirm that he or she is the person whose record has been revealed before issuing the automatic bar. This contact point can be used to determine the immediate impact of a bar and to advise the applicant about the appeal process and how to seek a stay order.

Automatic bars protect children against serious risks in a practical and effective way. In a national scheme, the automatic bar should be applied to sex offences with child victims, including the import, manufacture or distribution of child pornography, as this is already universally agreed amongst the jurisdictional schemes.

## ***12. The adequacy of the risk assessment process.***

In addition to the list of barring offences in Schedule 2 of the Act, there is also another list of records set out in Schedule 1 of the Act that trigger a risk assessment.

It is not possible for any authority to say with certainty what any person will do in the future. The WWCC is based on the evidence of experts in offender behaviour that there is a statistical correlation between past sexual and violent offending and future similar offending. It is more likely that a person who has previously committed sexual or violence offences will commit them again, though people with no history of such conduct may also become offenders. There are statistically accepted mitigating factors that reduce the risk of re-offending. These mitigating factors include:

- current age over 50
- more than 10 years since last offence
- offence less serious (sentence did not involve gaol term)

- stable intimate relationship
- stable place of residence
- regular and stable employment.

WWCC risk assessment processes in NSW are comprehensive and are based on this expert knowledge. Risk assessment outcomes are tested in the Administrative Decisions Tribunal, so they must meet a high standard. Under the previous WWCC settings in NSW, the Tribunal heard appeals against prohibited status. The WWCC operators are informed by the high standards required by the Tribunal in risk assessments.

The NSW WWCC involves consideration of the full criminal records of applicants. Each record is reviewed to determine whether an automatic bar is required and whether the record falls into a category requiring risk assessment. Under NSW law, risk assessment must take into consideration a range of risk factors and a range of factors that mitigate risk. The factors requiring consideration are:

*Risk factors*

- the seriousness of the conduct
- how recent the conduct was
- the seriousness of any other records of the applicant
- the likelihood of repeat offending and how it would impact on children
- age of the offender and victim
- relationship between offender and victim
- vulnerability of the victim
- any other relevant considerations.

*Mitigation factors*

- applicant's subsequent conduct / behaviour (stability of relationships, residences, training, employment etc)
- whether the offender knew the victim was under 18
- offender's present age
- any other information relating to the applicant
- any other relevant considerations.

***13. To what degree should the WWCC minimise the need for institutions to establish clear processes for responding to inappropriate behaviour of staff in child-related positions?***

The WWCC does not minimise the need for institutions to establish clear processes for responding to inappropriate behaviour of staff in child related positions. Thus, it does not release employers from their duty to protect the children in their care. The child safe organisations program in NSW helps employers to implement practices that will help them meet their duty of care by:

- ensuring workers have the required skills, qualifications and personal attributes for working with children

- using the WWCC and checking references for new workers
- promoting codes of conduct that show workers, children and families what conduct is acceptable and unacceptable in the organisation
- having practices that support these policies
- identifying and managing risks to children in the organisation
- listening to children and taking their concerns seriously
- effective investigations of complaints and allegations.

The very significant benefit of child safe practice as a supplement to the WWCC is that child-safe practice works for the entire workforce, including people who are yet to offend, and those whose offending has not been reported. Child-safe practice is the most important contribution employers can make to the safety of children.

Employer obligations in NSW include proper investigations of allegations about abuse of children, and reporting to the WWCC operators when they have found that a person has seriously abused a child or children. Reporting of serious workplace abuse of children is required if the WWCC is to protect children effectively.

Some jurisdictions regulate children's organisations to ensure that child safe standards are in place. The Children's Guardian is currently considering options for a regulatory response. The options for how this might be achieved will be addressed in the response to the next Issues Paper on Child Safe Institutions.

#### ***14. How should the effectiveness of any existing or proposed WWCC be evaluated and / or monitored?***

Some options for evaluating and monitoring the effectiveness of the WWCC are:

- monitoring employer compliance with the WWCC through targeted compliance programs to show whether it is used in all children's sectors as required. This will identify any areas where offenders could avoid a WWCC.
- monitoring the incidence and seriousness of abuse of children in workplaces to identify any reductions in either factor (the NSW Ombudsman may already have useful data on this )
- monitoring the adoption of child safe practices by children's organisations
- continued monitoring of research on recidivism of sex offenders to fine tune the use of automatic bars and targeted risk assessments
- access and evaluate records of abuse of children by parent/family volunteers to inform policy for the WWCC for this group
- monitor demand for WWCC to determine whether it is being used over- or under-used.

The new NSW WWCC model will be evaluated after two years of operation to provide an opportunity for fine tuning and amendment. The legislation also requires that the Minister is to review the Act after five years of operation to determine whether the policy objectives remain valid and whether the terms of the Act remain appropriate.

Apart from the above, the Children’s Guardian consults with stakeholders on an ongoing basis regarding any provisions of the new Act and Regulation that require clarification. Such ongoing engagement with the stakeholders ensures that any misconceptions or problems with the new model are dealt with efficiently by way of clarification, further consultation or immediate amendment, if necessary.

Ultimately however, the effectiveness of any existing or proposed WWCC is reliant on good child safe policies and practices and a strong compliance program. On its own, it should not be considered a panacea for eradicating risks to the safety of children.

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